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IN THE

SUPREME COURT OF THE UNITED STATES.

AH HOW, alias LOUIE AH HOW, Appellant, vs. THE UNITED STATES.	No. 307.
CHU DO, alias CHU GEE, Appellant, vs. THE UNITED STATES.	No. 308.
LEW GUEY, Appellant, vs. THE UNITED STATES.	No. 309.
TOM HONG, alias HOM POE, Appellant, vs. THE UNITED STATES.	No. 310.
TOM DOCK, alias HOM DOCK, Appellant, vs. THE UNITED STATES.	No. 311.
YUN[illegible] Appellant, vs. THE UNITED STATES.	No. 312.
LEE KIT, Appellant, vs. THE UNITED STATES.	No. 313.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

Appellants' Brief in Opposition to Motion to Vacate Orders Admitting to Bail and to Dismiss or Affirm Appeals.

This is a motion to vacate orders authorizing the appellants above named to give bail in the sum of $500 each, which orders were made by Mr. Justice Peckham in April, 1903, after the allowance of appeals to this Court in the above-entitled cases arising out of the Chinese Exclusion Acts; a motion to dismiss or affirm such appeals is also included.

The complaints against these defendants taken before United States Commissioner Benedict in the Eastern District of New York, under Section 6 of the Act of May 5th, 1892, as amended by the Act of November 3rd, 1893, charged that the defendants, being Chinese laborers not entitled to remain in the United States without a certificate, "did knowingly and wilfully * * * fail to obtain * * * a certificate * * * and having come unlawfully into the United States without a certificate," were "found within the jurisdiction of the United States at Brooklyn, in said District, without a certificate of residence as required by law." Their deportation was ordered by the Commissioner and the District Court for the Eastern District thereafter duly affirmed such order. Appeals were taken to this Court upon the ground that Treaty and Constitutional questions were involved. (Chin Bak Kan *v.* United States, 186 U. S., 193; U. S. *v.* Gue Lim, 176 U. S., 459; U. S. *v.* Wong Kim Ark, 169 U. S., 649.)

Preliminary.

These are the first cases which have come directly before this Court since the Fong Yue Ting case (149 U. S., 698) in which a consideration of the registration provisions of the Act of 1892, as amended by the Act of 1893, is involved.

These cases differ radically from nearly all those reported since the Fong Yue Ting case in this, that they are in no sense "entry" cases. It was practically conceded by the Government (no proof to the contrary whatever being offered) and expressly found by the Commissioner in nearly all of the cases that *the appellants had been residents of the United States for years.*

There are no disputed questions of fact which this Court is asked to review. The findings of fact are with the defendant on five of these cases, and all of them are in this Court purely and simply upon questions of law, it being contended that the Commissioner erred in his determination of the questions of law presented on the facts.

The Government's motion embraces two parts; first, the vacation of the orders for bail; and second, the dismissal or affirmance of the appeals. The grounds for each are fundamentally the same, the main attack being directed to the good faith of the appeals:

(*a*) Upon the ground of lack of merit in the facts; and

(*b*) The lack of novelty in the questions of law presented for review.

The right to bail under the statutes and authorities is discussed in the Government's brief at length; but it seems to be conceded from the whole argument that the Court has inherent power to admit to bail in these as well as in all other cases. The attack upon the good faith of the appellants can only be regarded as wholly gratuitous and unnecessary.

As to the Merit of the Facts:

A brief review of the general situation which obtained at the time these arrests were made is allowable in view of the fact that the learned Solicitor-General has seen fit to depart from the record in his presentation of the Government's motion.

These arrests as well as a number of arrests made in the Southern District of New York at about the same time under the direction of Ralph Izard, then Chinese Inspector at the Port of New York, were the occasion for an inquiry instituted by the Treasury Department into the official conduct of the said Ralph Izard, such Chinese Inspector, the result of which inquiry was the dismissal of Izard from the Government service. It was established that prior to and at about the time of the making of these arrests attempts were made by persons representing themselves to have come from Izard to compel the purchase by Chinese residents of New York and Brooklyn of bogus certificates of discharge. If they failed to make the purchase, arrest followed. It was further established that efforts were made to intimidate United States Commissioners as well as the United States Marshal at New York for the purpose of making the scheme effective.

In all the cases in which arrests were made in New York, the Commissioner discharged the prisoners upon the ground that fraud had been practised upon the Court in obtaining the warrants, and misrepresentation of fact had been made both to the Court and the District Attorney. The detailed reports involving all these matters are now of record in the Treasury Department.

The matter of these investigations we respectfully submit, is of more importance in the administration of the Chinese Exclusion laws and is entitled, we submit, to greater consideration at the hands of the Court than the mere averment that the so-called "McGettrick certificates" were fictitious and fraudulent; especially in view of the fact that the authenticity and genuineness of the certificate offered was not attacked at the hearing before the United States Commissioner.

It is not disputed by the learned Solicitor-General that McGettrick was a United States Commissioner at the time the certificate was granted, or that he had the power to act in Chinese cases. The particular question

which he passed upon in the Lew Guey case, No. 309, to wit, the question of citizenship, was one which under the recent decision in the case of Chin Bak Kan (186 U. S., 193), the Commissioner had the right to determine.

Now, as to the merit of the facts in the particular cases presented for review.

The Lew Guey Case (No. 309).—The certificate offered was in effect a judgment of the Commissioner, dated on the day of the hearing, adjudging the defendant on the evidence produced to be a citizen of the United States (fol. 9). Its authenticity was admitted (fol. 25). It was found in the defendant's possession at the time of his arrest (fol. 11). He was known by that name and was charged under that name. He testified to the circumstances of the hearing and described the physical appearance of the Commissioner (fol. 18).

The Chu Do case (No. 308), in which the "alternative 'uncle' appeared" is next the subject of the Government's attack.

The defendant shows that his father was taken sick; that an affidavit from him was offered; that counsel for the defendant had consulted him in his office; that an offer to take his testimony by interrogatories was made (fols. 20-22).

As to the Merchant Cases.—Three of these defendants, Tom Dock, alias Hom Dock, No. 311; Tom Hong, alias Hom Poe, No. 310, and Lee Kit, No. 313, were copartners with others at 15 Doyer Street, in the City of New York, as members of the firm of Kwong Yen Ti & Co., from the years 1891 to 1895 inclusive (fol. 17). Tom Dock has been in the United States for over thirty-two years.

Tom Hong and Tom Dock were arrested at the same place, No. 510 Myrtle Avenue, in Brooklyn, and the third, Lee Kit, was arrested a block away on Myrtle Avenue.

The witness Feldman, was the agent of the premises 15 Doyer Street. He swore that he saw the defendant Tom Dock, sign the lease (fol. 31), that he collected rents from each of the defendants, that he saw each of them selling and receiving goods and shipping goods. He was introduced to each of the other defendants as partners at the time they entered into possession, and was shown the copartnership articles (fol. 46).

The witness O'Brien, an expressman, testified that he did business for each of these defendants, in the way of shipping goods for each of them as members of this firm and delivered goods to them. There was no dispute whatever as to the fact that these men were engaged in business. In fact, the Commissioner expressly so held, saying in his opinion:

"*The proofs furnished in these cases are sufficient to show that these three persons were engaged in business rather than in manual labor in 1894*" (Tom Hong Record, page 17; Lee Kit Record, page 18; Tom Dock Record, page 30).

The Commissioners' findings on the facts were clearly justified.

Our contention is that his conclusions of law based on these facts were erroneous. He was satisfied that they were merchants but he was not satisfied that their status was established within the doctrine laid down in the case of U. S. *v.* Pin Qwan, 100 F. R., 609, where the construction of the statute defining "merchant" was concededly *obiter*.

In his review of the testimony in these three cases, the learned Solicitor-General rather ingenuously overlooked the fact that the situation not only warranted but demanded that the witness in one case should testify in the other two, as to the occupation of the defendants from 1891 to 1895. *Each was a merchant, each a member of the same firm at the same place of business.*

He also overlooks the fact that in the one remaining merchant's case (Ah How, No. 307) another witness,

(one whom the Commissioner in the Yung Lee case designated as a credible white witness) gave the testimony.

In the Yung Lee case, it was established to the Commissioner's satisfaction by the testimony of a credible white witness that the defendant was a resident of the United States on the 5th of May, 1892. (Opinion of Commissioner, page 19, Yung Lee Record, 312), but it was not clearly established to his satisfaction that the defendant was unable through sickness *during all the time* given by the statute to obtain a certificate of residence, his conclusion evidently being that the testimony of the illness during the whole period must also be furnished by a credible white witness. The defendant himself testified that he was unable to go out until August, 1894, which was beyond the period fixed by the statute.

In the Ah How case, No. 307, the same white witness who is designated in the Yung Lee case as a credible white witness by the Commissioner, testified that he had known the defendant for upwards of twelve years (page 7 of the Ah How Record), saw him handle goods, and heard him say that he was a partner.

So much for the merit of the facts in these cases. It would seem to counsel for the appellants that never before were cases presented to this Court by Chinese appellants in which the good faith of the appellants was so clearly demonstrated.

As to the Merit of the Assignment of Errors Presented for Review:

In these cases we ask for a construction of the statute of April 29th, 1902, which contains an important variation from the prior statutes re-enacting Chinese Exclusion Acts, in this to wit: That it provides merely that the prior acts are re-enacted, extended and continued only *"so far as the same are not inconsistent with Treaty obligations."*

(It may be mentioned, parenthetically, that this clause was introduced after counsel for the Chinese Minister, Honorable John W. Foster, had shown the Senate Committee on Immigration that many provisions of existing law were violative of our Treaty obligations with China.)

It is claimed by the appellants that the effect of this clause, coupled with the Treaty obligation to grant to Chinese persons, "either permanently or temporarily residing in the United States for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens," has been to supercede or revoke,

(*a*) The provisions of Section 3 of the Act of May 5th of 1892, as to the burden of proof being on Chinese persons;

(*b*) The provisions providing for the deportation of Chinese residents who failed to procure certificates of registration;

(*c*) The statutes claimed by the Government as denying the right to bail, these provisions being a discrimination against Chinese resident aliens in this that they are a denial of the protection secured to citizens of every other, much less the most favored nation.

That this clause of the act of 1902 has had the effect of displacing certain other provisions of the Chinese Exclusion Acts is recognized by the Attorney-General in an opinion dated December 4th, 1902 (24 Opinions, page 545), where he says:

> "There are other provisions of Section 7 of the Act of 1888 upon which these re-enactments and extensions in the Act of 1902, may take effect, *and the later Act expressly continued existing law only so far as the same are not inconsistent with Treaty obligations.*"

If the effect of the Act of 1902 is as appellants contend, they are brought within the protection of Article 4 of the Amendments to the Federal Constitution, providing that:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue, but on probable cause supported by oath and describing the place to be searched or the persons or things to be seized."

Other questions presented include,

(*a*) The question of the jurisdiction of the Commissioner to hear and determine an exclusion case where the status of the defendant as an American citizen had already been adjudicated by another Commissioner of co-ordinate power.

(*b*) The right to order the deportation of three Chinamen found by the Commissioner to have been engaged in business rather than in manual labor during the year 1894, when the Statute required Chinese laborers to register was in operation (involving the construction of the Merchant clause of the Act of 1893 for the first time in this Court).

(*c*) The right to order the deportation of a Chinaman found by competent white testimony to have been a resident of the United States during the time the registration laws were in operation and found to have been sick during a portion of that time, upon the mere ground that he might have registered during some portion of that period, notwithstanding the exception in the Act of 1893, and notwithstanding that at the hearing the defendant asked for permission to register (involving a construction of the 6th clause of the Act of 1893).

(*d*) The right of the Commissioner to proceed and

order deportation on complaints which were defective *not merely in form but in substance;* complaints which indicated the existence of a third statutory class, *i. e.,* Chinese persons coming into the United States without a certificate and failing to procure the same; a clause which the statutes do not recognize. A charge that these Chinese persons came into the United States without a certificate and having come, failed to procure one, is not an offense under the Chinese Exclusions law.

(*e*) The right to bail, pending appeals to this Court in these exclusion cases.

The doctrine of *stare decisis* does not apply to any of the questions raised by these appeals.

All of these matters are matters which should be determined on their merits; the construction of the Act of 1902, the effect of the clause hereinbefore pointed out are questions which must, sooner or later, be submitted to this Court for determination.

These appellants are rendering a public service in bringing these matters to the attention of the Court at this early day so that those charged with the administration of these laws may be properly advised as to their scope and purpose. Far from being "trivial" or "frivolous" the questions are of immeasurable importance to both the Government and these appellants as well as to all Chinese persons within the United States.

POINT I.

Section 3 of the Act of 1902, placing the burden of proof on Chinese defendants; section 6 of the same act as amended by the Act of 1893, in so far as it relates to the deportation of Chinese residents; the statutes claimed by the Government to forbid bail in these cases, have all been revoked or superceded by the Act of 1902, which (in providing for the re-enactment of the Chinese exclusion laws only in so far as the same were not inconsistent with treaty obligations) assures to Chinese persons, *either permanently or temporarily residing in the United States* for the protection of their persons and property all rights given by the laws of the United States to citizens of the most favored nation; the acts first above-mentioned being inconsistent with such treaty provision.

The question here is not as to the power of Congress to enact laws for the deportation of Chinese residents, even where such legislation would be in violation of treaty obligations, but rather whether the Act of 1902 did not indicate a legislative intent to restore to Chinese residents of the United States the rights and privileges which previous legislation had denied them. There is abundant reason for giving to this latest legislative expression as broad a construction as the appellants contend for.

If the earlier statutes were in conflict with the treaty (and that they were is conceded),

See Chae Chang Ping *v.* U. S. (130 U. S., 581);
Lem Moon Sing *v.* U. S. (158 U. S., 538);
Fong Yue Ting *v.* U. S. (149 U. S., 697),

surely there is a positive repugnance between them and an act which re-enacts these prior acts only in so far as they are not inconsistent with Treaty obligations.

Harmony is impossible between the provisions enumerated in the heading and the fourth clause of the Treaty of 1894 between the United States and China, where it was agreed that

> "Chinese laborers or Chinese of any other class either permanently or temporarily residing in the United States shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nations, excepting the right to become naturalized citizens."

These statutes are therefore repealed to the extent of their repugnancy.

Wood *v.* United States (16 Pet., 342, 363).
United States *v.* Tynen (11 Wall., 88).
South Carolina *v.* Stoll (17 Wall., 425).

> "Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the Court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry, whether rights secured by such stipulations shall be recognized and protected.

Chew Heong *v.* United States (112 U. S., 536).

Further it will be noted—(a) that the attention of Congress had been drawn to these statutory violations of the Treaty of 1894 by Mr. Foster (*ante*, p. 8); (b) that the conditions which obtained throughout the country with regard to Chinese residents were vastly different from those which confronted the country at the time of the passage of the earlier acts; (c) that it was recognized by Congress, that as to "entry" cases or "border" cases the exclusion laws were easy of enforcement. Therefore it was with the manifest purpose of restoring to Chinese residents the same rights, privileges and immunities which all other aliens of the United States enjoyed that this clause was incorporated in the Act of 1902.

The Courts have drawn a distinction between an alien who remains here and one who has left here and seeks to return. "While he (an alien) lawfully remains here he is entitled to the benefit and guarantees of life, liberty and property secured by the Constitution to all persons of whatever race within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence are as fully protected by the Supreme law of the land as if he were a naturalized citizen of the United States. But when he has voluntarily gone from the country and is beyond its jurisdiction, being an alien, he cannot re-enter the United States in violation of the will of the Government, as expressed in enactments of the law-making power."

Len Moon Sing *v.* U. S. (158 U. S., 547-548).
U. S. *v.* Wong Kin Ark (169 U. S., 700).

It was right and proper, therefore, for Congress, in view of all these considerations, to restore to these oppressed people the status which the Courts would have given them but for these enactments, which have been characterized as an exercise of "arbitrary and despotic power."

Fong Yue Ting *v.* U. S. (149 U. S., 697).

The provisions of Section 3 of the laws of 1892 are indisputably an unfair and oppressive discrimination directed against Chinese residents of the United States and is violative of Clause 4 of the treaty. It puts Chinese residents of the United States in the same class with those unlawfully seeking entrance. It clearly subjects them to restrictions which no other alien residents of the United States are subjected to. This is one of the evils which the Statute of 1902 was designed to remedy.

The provisions as to compulsory registration of Chinese laborers residing in the United States (Sect. 6 of the Laws of 1892 as amended by Laws of 1893) is as unfairly discriminating as is Section 3. This notwithstanding the fact that these provisions have been sustained in this Court in the Fong Yue Ting case. Certainly the subjects of no other nation are so discriminated against. And the hue and cry which would be raised if Congress sought to so discriminate against subjects of any other nation is beyond the power of our imagination to comprehend.

Though by Article V there seems to be a consent to the enforcement of these registration acts, it appears merely that the Chinese Government did not object to the enforcement of the same in so far as they were designed merely with a view of affording better protection to Chinese laborers in the United States in 1892.

To contend that this clause had any wider scope would be to urge that all of the provisions of that act were acceptable to China including, as well as any other, Section 4 of the Act of 1892, providing for imprisonment of Chinese persons, "convicted and adjudged to be not lawfully in the United States," including of course laborers who failed to register, which section was held to be violative of the 4th and 5th Amendment to the Federal Constitution.

Wong Wing *v.* United States, 163 U. S., 227.

While we deny that the statutes claimed by the

Government to forbid bail on appeal in these cases have the effect which the Government claims for them, we contend that granting that they possess this effect, they violate this same treaty provision. Some cases hold that these proceedings have all the elements of a civil case (Fong Yue Ting *v.* U. S.), while others hold that they have the elements of a criminal proceeding (Wong Wing *v.* U. S., 163 U. S.; *ex parte* Sing, 82 F. R., 22). In either event the Statutes work a denial of the right to bail which all other aliens as well as citizens have.

It also follows that the 8th Amendment to the Constitution providing that excessive bail should not be required, logically forbids a total denial of bail.

POINT II.

The objection as to the sufficiency of these complaints is not affected by the decision in the case of Chin Bak Kan, 186 U. S., 193.

In that case the objection "related to the lack of positive averment of the facts and as to the official character of the person who made the complaint." Also that the charge was made on information and belief, though that objection was not made at the hearing.

If these appellants had been brought before the Court charged with the offense designated in the Statute, the objection made would of course not be tenable, but no warrant should have issued upon a complaint which charged an offense not defined by any statute. There is no such clause mentioned in the statute such as is indicated in each of the complaints, *i. e.*, a Chinaman coming within the United States unlawfully and then failing to procure a certificate of residence. (Indicating thereby that their unlawful coming could thereafter be legalized by their obtaining a certificate.) A

proper case should have been made out in the complaint before these appellants should be subjected to these onerous burdens.

The complaints should have charged the defendants to have been within either of the following classes:

1. Those Chinese laborers who were entitled to remain in the United States before the passage of the Act of 1892 and who neglected, failed or refused to comply with its provisions or the provisions of the amendments of 1893.

2. Those Chinese laborers who came to the United States after the passage of the Act.

See Wong Wing *v.* U. S., 163 U. S., 235.

POINT III.

Neither the Act of 1892, nor the Act of 1893 amending it, required that Chinese persons who were merchants or who "were engaged in business rather than manual labor" should procure certificates of residence during the period when the Registration provisions were in force.

In the case of Tom Hong (310), Tom Dock (311) and Lee Kit (313) it should be noted, that as to the measure of proof offered with regard to the number of witnesses, the appellants complied with the requirements of the clause of the Act of 1893, requiring the testimony of two credible white witnesses to establish the merchant status of a Chinaman *seeking entrance to the United States* upon the ground that he was formerly a merchant engaged in business in the United States.

Now, what is a merchant within the meaning of the Act of 1893?

> "The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: *A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.*"

And what relevant judicial expression have we had as to this clause?

The Circuit Court of Appeals in the Ninth District, Mr. Justice McKenna writing the opinion, has held that where the other requirements of the Statute are met, the phrase requiring that the "business be conducted in his own (the merchant's) name," should be so broadly construed as to practically eliminate this requirement.

Lee Kan *v.* U. S. (62 F. R., 914).

We have, too, the Pinn Kwan case (100 F. R., 609, Opinion by Mr. Justice Lacombe).

The defendant in that case sought admission, and was admitted to the United States upon the production of a certificate required by Section 6 of the Act of 1884 (proof as to merchant status in China).

Some time after his admission his deportation was sought, the main ground urged being that the certificate purporting to show that he had been engaged in business as a *merchant in China* was defective. Other evidence was offered, to show that after his arrival in the United States he was engaged in business as a merchant in Buffalo.

The Court held that the certificate was the only proof properly admissible, and reversed the judgment of Mr.

Justice Coxe (94 F. R., 824), upon the ground that the certificate failed to satisfy the requirements of the Statute.

The Court's expression as to the amount of proof required to establish the status of merchant in the United States was, therefore, clearly *obiter dictum*.

But the difficulty we meet with here is that what the Court said on this branch of the case was regarded by the commissioner in these cases as controlling, even though conceded by him to be *obiter* (p. 31, Tom Dock Record).

He finds that these men were engaged "in business, rather than in manual labor," but contends that what their "interest" was did not appear. But on the question of "interest," what do we find?

In the Lee Kan case, we find quoted the debate on the "merchant" clause of the act which clause had been offered as an amendment by Mr. Geary, a member of the House, the author of an earlier act.

He says that the amendment merely required a Chinaman *asking to be admitted into the United States* to prove that for at least one year at some fixed place of business, he was engaged in buying and selling merchandise. "We do not demand that he shall have a dollar's worth of stock or a thousand dollars' worth."

The opinion shows clearly that the line of this argument was accepted by the Court as the correct expression of the legislative intent as regards this amendment.

We should not lose sight of the fact that in the cases at bar the defendants were not seeking admission, but each of them had been here for a period of upwards of twenty years.

Challenging the necessity for establishing their "interest" under the statute we contend that it would be difficult to find stronger proof than was furnished in these three cases to establish the interest of each of the defendants as partners and as merchants.

Each of them was introduced to the witness Feldman,

at the time the lease was executed, as a partner (pp. 18 & 20, Tom Dock Record).

The defendants signed the lease (p. 18). He, Feldman, collected rent from each at various times (p. 20). He saw each of them buying and selling goods. "These were the stand-bys of the firm" (p. 20). He was shown the articles of copartnership (p. 20) with the names of each of these defendants thereon.

The witness O'Brien testified to facts equally as convincing. The defendants, Tom Dock and Tom Hong, also testified to the nature of their interest and accounted for the failure to produce the copartnership articles, and accordingly, secondary evidence thereof was offered.

Surely, these records fulfill every requirement of the statute—concededly, they were not "engaged in manual labor"—were not laborers in 1894—and as laborers were the only class affected by these registration provisions, the Commissioner erred in not discharging the defendants.

"The question is not whether the respondent is a merchant and so exempt from registration, but whether he is a laborer and so liable to deportation for want of registration." He does not appear to be a laborer within either common understanding or the statutory definition of the term.

U. S. Mark Ying (a peddler), 76 Fed. Rep., 450.

If these defendants were engaged in business in 1894, rather than in manual labor, but since, through misfortune or other cause have become laborers, they are, nevertheless, not subject to these registration provisions.

The government has recognized that only laborers were affected by these provisions.

"The persons referred to in the Acts of Congress to which these regulations apply and whose immigration

into the United States is prohibited *are limited* to Chinese laborers."

(Treasury Doc., No. 14,542½) Nov. 25th, 1893.

The Ah How case (No. 307).

In the remaining "merchant" case (Ah How alias Louie Ah How, No. 307), no opinion was rendered, but the same influence which operated to bring about the conclusion in the other three merchant cases undoubtedly controlled the decision of the commissioner in this case; to wit, the opinion in the Pin Kwan case, coupled with the belief that all classes but merchants were required to register.

The witness Dennis O'Sullivan called by the defendant in this case is the same witness who was called in the Yung Lee case (No. 312) and declared by the commissioner to be a credible white witness. It is clearly established by his testimony that *the defendant was not a laborer during the registration period.* He knew the defendant in 1890, twelve years before the hearing.

Under the decisions above referred to, as well as under the practice of the department having charge of the registration of laborers, and in line with the suggestion contained in the Chu Poy case (81 F. R., 826), that a merchant's clerk is not a laborer within the meaning of the Statutes, it is respectfully urged that the commissioner erred in ordering deportation in this case.

POINT IV.

The doctrine enunciated in the case of U. S. v. Gue Lim et al. (176 U. S. 462), (as to wives and children of merchants not being called upon to produce certificates), should be followed in the cases of Chu Do (No. 308) and Lew Guey (No. 309), who were children at the period when the registration provisions as to laborers were in force.

It is plain that in these cases, these minors, Lew Guey, then being nine years of age, and Chu Do, fifteen years of age, could not obtain a laborer's certificate of residence.

See *In re* Tung Ying (19 F. R., 184),

where the Court regarded the production of merchants' certificates by childen of ten and fifteen years of age as an "absurdity."

This is simply a *casus omissus* on the part of Congress. There was no provision requiring children,—even children of laborers—to register, and now that these appellants have reached man's estate, this omission on the part of the Government should not be charged to them.

POINT V.

In the Yung Lee case (No. 312) the Commissioner erred in not discharging the defendant and in not ordering that a certificate of residence be issued to him.

The commissioner found that this defendant was "a resident in the United States on the 5th of May, 1892." In fact, it was shown by the same "credible white witness" that he knew the defendant as far back as 1878 or 1879.

The Statute merely requires that the fact of residence be estabished by the testimony of "one credible witness other than Chinese." The commissioner evidently assumed that this requirement applied also to the fact of illness. In this he was undoubtedly guilty of error. The testimony of the defendant, which was uncontradicted and unimpeached, showed that the condition of illness continued through the entire period covered by the Act.

The finding of the commissioner was clearly against the weight of evidence. The evidence as to the illness of the Chinaman was established in part by the testimony of the white witness. The defendant's evidence as to his illness was clear, positive and uncontradicted. There was no element of inherent improbability in it.

"A court is not at liberty to arbitrarily and without reason, reject or discredit the testimony of a witness upon the ground that he is a Chinaman."

Woey Ho *v.* U. S. (109 Fed. Rep., 888).

POINT VI.

Commissioner McGettrick had power to determine the question of citizenship (Chin Bak Kan v. U. S., 185 U. S. 193), and no statutory form of certificate or judgment being prescribed, the certificate delivered by the Commissioner to the defendant Lew Guey (Case No. 309) should have been admitted as an adjudication of his citizenship.

Its genuineness was admitted (fol. 25). It was not impeached in any way. It was admitted as evidence of a hearing (fol. 26). It was found in the possession of the defendant. This form has hitherto been accepted by judicial officers.

If there was any fraud in the issuance of the certificate, no evidence of it was offered.

In what other way than by a form of a certificate or judgment such as was here presented could the rights of any person of Chinese descent be protected?

The power to hear and determine necessarily carries with it the power to make this judgment or certificate.

The commissioner should have given the certificate the force and effect demanded for it, and erred in denying the motion for defendant's discharge upon the ground that his citizenship had been established.

POINT VII.

Bail should be allowed upon these appeals (a) under the statutes; (b) by virtue of numerous precedents; and (c) in the exercise of the inherent power of the Court.

Section 945 of the Revised Statutes authorizing bail in civil cases and sections 1014 and 1015 of the Revised Statutes and Rule 36 of the rules of this Court, providing for bail in criminal cases, surely include within their scope these cases, whether they may be regarded as having "all the elements of a civil action" or whether they may be regarded as *sui generis*. It has been the custom of the Courts both before and after the passage of the Acts of 1892 and 1893, to admit Chinese residents to bail, pending appeal in deportation cases. In the Lee Yen Tai case and the Chin Bak Kan case, the cases most recently decided in this Court, bail was permitted, and although a motion to vacate the orders for bail was made in the Chin Bak Kan case, no decision was ever rendered thereon.

In the cases at bar a motion for bail was made before Mr. Justice Peckham, who gave the matter careful consideration before granting the orders, it being a fact that the transcript of the testimony in one of the cases (Tom Dock, No. 311), was submitted to Mr. Justice Peckham for examination before he granted the orders for bail.

Counsel for these appellants have been, fortunately, able to procure a copy of an opinion handed down by Mr. Justice Lowell, of the District Court for the District of Massachusetts, upon the question of the right to bail in deportation cases, which opinion fully answers every ob-

jection made by the learned Solicitor-General in these cases upon the question of a ~~statutory~~ right to bail. The opinion is printed herewith in full, though it includes some matters that are not relevant to the questions at issue here.

The opinion follows,

Matter of Ah Tai, decided Tuesday, November 16th, 1903.

LOWELL, *J.* A Chinaman was complained of under the Chinese Exclusion Acts of 1892 and 1893 as being a Chinese laborer in the United States without authority. After hearing, the Commissioner ordered his deportation. He has duly appealed to me, and pending a hearing on his appeal, asks to be admitted to bail. The district attorney has opposed his petition and has objected that he cannot be bailed under the circumstances.

The bailing of Chinamen under the Exclusion Acts is not easily brought within the general principles governing the law of bail and recognizance. In Fong Yue Ting, 149 U. S., 698, it was held that the proceedings under these Acts are not criminal in their nature. It was there said "When the executive officer brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depend his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, a defendant and a judge," p. 728. "The proceeding before a United States judge, as provided for in Section 6 of the Act of 1892, is in no proper sense a trial and sentence for a crime or offense," p. 730. See Li Sing *v.* U. S., 180, U. S. 486, 494. The decision of the first-mentioned case turned upon the nature of the proceedings for deportation. Had these been deemed criminal, the statue would have been held unconstitutional. It seems to follow that Chinamen whose deportation is sought by the United

States have not the right as persons accused of crime, to demand release upon bail.

On the other hand, if the proceedings for deportation are deemed civil in their nature, it is not easy to find authority for admission of the respondent bail, unless an arrest in a civil case necessarily imports the right to a release upon bail. The statutory provisions for special bail (Sec. 942), have little apparent application to a case like this, and Section 945 provides merely that certain officers may take bail, where bail is required or allowed. In the deportation of Chinese, the proceedings are *sui generis;* they are authoritatively declared to be civil in their essence, but they are somewhat criminal in their appearance. Thus the statutes speak of violation of the provisions of the Act, of arrest, conviction and imprisonment at hard labor. In judicial opinions the courts have spoken of testimony in a deportation case as incriminating the respondent; *Ex parte* Ling, 82 Fed., 22; of "the offense (using the word only for convenience)" and of "primitive provisions," *In re* Ng Loy Hoe, 53 Fed., 914; of "verified complaint" and "warrant," U. S. *v.* Wong Dep Ken, 57 Fed., 206. See U. S. *v.* Long Hop, 55 Fed., 58; of "presumption of innocence," *In re* Chu Poy, 81 Fed., 826, 828; of "a plea of not guilty" and "a finding of guilty," *In re* Tsu Tse Mee, 81 Fed., 562, *In re* Gut Lun, 83 Fed., 141, 142; of a respondent as "tried and convicted," U. S. *v.* Long Ho, 55 Fed., 58, 59.

In this and other districts, bail has been taken at some stage of the proceedings for deportation. This is the practice in the Districts of Vermont and Southern New York, both before the Commissioner's hearing and after an appeal to the judge. Until objection was made in this case, the practice in this district has been the same without objection. This has been the practice in the District of Maine until lately, when the legality of admitting to bail after the Commissioner's judgment of deportation has been mooted. Bail was taken in the case of Mrs. Gue Lim, 176 U. S., 459, in U. S. *v.* Moy

Lee, 109 Fed., 1, and has been recently taken, I am informed, by Mr. Justice Peckham in certain cases now pending before the Supreme Court. *See also* Chow Goo Pooi, 25 Fed., 77, 78. The admission to bail in proceedings for habeas corpus is governed by statute and has no application to the case at bar.

The Exclusion Acts themselves recognize by implication that bail is not altogether excluded in proceedings thereunder. Section 2 of the Act of 1893, by providing that a Chinaman shall not be admitted to bail at one stage of the proceedings, impliedly recognizes that he may be admitted to bail at another stage. Even in proceedings for extradition, the Supreme Court has refused to declare that courts were wholly without an inherent right of taking bail. It is also most convenient that bail should not be altogether excluded. Were bail never taken, the jails might be overcrowded, and the recent arrests in this city show that this danger is not imaginary. To hold bail altogether inadmissible under the Act would invalidate hundreds of existing recognizances.

The reported cases, the practice of many judges, the language of the statutes, and practical convenience all combine to suggest that bail should not be altogether excluded in proceedings for deportation. This court is not disposed to disregard consideration of such importance.

If bail be anywise admissible, it may ordinarily be taken pending an appeal, as well as before the original hearing. Thus it was said in Hudson *v.* Parker, 156 U. S., 227, 285, "The statutes of the United States have been framed upon the theory that a person accused of crime shall not until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error." The appeal is here to the district judge rather than to the district Court (U. S. *v.* Chow Loy, 115 Fed.), but there is nothing intrinsically improper in admission to bail

by a judge rather than by a court, nor does any reason appear why a respondent may not give bail to appear before a judge as well as before a court.

The Government relied chiefly upon an express prohibition of bail, after sentence of deportation by the Commissioner, supposed to be found in the second section of the Act of 1893. "Such order of deportation shall be executed by the United States marshal of the District within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order, such Chinese person shall remain in the custody of the United States marshal and shall not be admitted to bail." But this clause applies only where the order of deportation is final, and it is inapplicable while an appeal from the decision of the Commissioner is pending. That an appeal from the judgment of the Commissioner is analogous to an appeal from the judgment of an inferior court, was said in 22 Opp. Att. Gen., 340. Pending an appeal it is not the duty of the United States marshal to deport the Chinaman with all convenient dispatch, and so there is no sufficient reason why "pending the execution of such order, the Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail." Even after judgment of deportation by the judge, a Chinaman was temporarily discharged from custody because the marshal was without means of deporting him. (Ny Look, 56 Fed., 81.) To prevent a release upon bail under those circumstances, the prohibition just quoted was inserted by Congress.

The form of recognizance hitherto used in this District in proceedings for deportation is like that used in criminal cases. Before the Commissioner's hearing, he admits to bail. After his judgment of deportation and an appeal therefrom the recognizance has hitherto been taken by the clerk of the District Court, conditioned that the respondent shall appear before the District Court of the United States "from day to day of this present term, and from day to day and from term to

term thereafter, then and there to prosecute said appeal and to answer to such matters and things as shall be objected against him on behalf of the United States, and relating particularly to the said appeal now pending in said court."

The condition "to appear before the District Court" may have been improvidently adopted. Perhaps the recognizance should be entered into before the judge in person. This decision is not intended to debar the district Attorney from moving to change the form of condition or otherwise to modify the existing practice.

This is a proper case for the exercise of the inherent power of the Court to admit to bail in all cases.

Counsel for the appellants believe that the good faith of the appellants has already been abundantly established.

The years of residence in the United States of each of the appellants, the novel questions presented; the facts in almost every case being conceded to be as represented by the appellants; the importance of the questions not alone to these appellants, but to practically every Chinese resident of the United States; the fact that the Government does not show that any injury can be wrought or ever has been wrought by reason of the allowance of bail in these cases, are certainly considera-

~~facts in almost every case being conceded to be as repre-~~

tions which make for the exercise of that power to admit to bail which this Court, in the recent case of Wright *v.* Henkel (190 U. S., 40), would not hold that it did not possess.

POINT VIII.

Upon the right to appeal.

The right to appeal in these cases was conceded by the Government in the Chin Bak Kan case and was so held by this Court.

The appeals involve the determination of treaty and constitutional questions, and under 26 U. S., Stat., §5, as amended, a direct appeal to this Court is permitted.

In the Lee Yen Tai case the appeal was taken to this Court by the Government and it is not unreasonable to urge that this fact should operate as an estoppel of the Government's claim that Chinese appellants should not be permitted to appeal to this Court for the redress of what they believe to be grievous errors.

POINT IX.

The orders appealed from should be reversed and the defendants discharged.

Respectfully submitted,

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